

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1818469

COUNTRY OF REFERENCE: Pakistan

MEMBER: Sean Baker

DATE: 17 December 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies subparagraph 36(2)(b) of the Migration Act.

Statement made on 17 December 2019 at 4:02pm

1. CATCHWORDS

REFUGEE – protection visa – Pakistan – Federal Circuit Court remittal – member of particular social group – failed asylum seeker – will not suffer harm for any convention reason – credibility issues – fabricated claims – honour killing – member of family unit of Australian protection visa holder – best interests of child – domestic violence – genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 36, 65, 91WB, 424AA, 425, 438, 499
Migration Regulations 1994 (Cth), Schedule 2

CASES

Kopalapillai v MIMA (1998) 86 FCR 547
MIEA v Guo & Anor (1997) 191 CLR 559
Nagalingam v MILGEA (1992) 38 FCR 191
Prasad v MIEA (1985) 6 FCR 155
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor (2006) 228 CLR 152

2.

3. Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant, who claims to be a citizen of Pakistan, applied for the visa on 4 March 2014 and the delegate refused to grant the visa on 31 March 2014. In that application this applicant was listed as a member of the same family unit as his then wife.
6. This matter has been before the Tribunal, differently constituted, on two previous occasions. The first time (the first tribunal), the applicant was listed as a member of the same family unit of his then wife, Ms [A]. On the second occasion before the Tribunal (the second tribunal), the applicant's application had been separated and he made his own claims to fear harm on return to Pakistan. These were disbelieved and the Tribunal, differently constituted, found the applicant and his [brothers] who gave evidence to not be credible and the refusal was affirmed on 19 January 2018. Ms [A] and the children of their relationship were recognised as being owed protection by a differently constituted Tribunal.
7. The applicant appealed to the Federal Circuit Court and in June 2018 the matter was remitted by consent on the basis that the Minister conceded that the Tribunal's decision was affected by jurisdictional error on the basis that the Tribunal did not comply with s.425 of the Migration Act 1958 because:
 - at paragraphs [45] and [51] of its decision, the Tribunal found that "there is no material before the [the Tribunal] that suggests [the applicant's current wife] would be unable to join [the applicant] in Pakistan as his spouse"; but
 - the Tribunal did not put the applicant on notice that the matter referred to in paragraph (a) above was a dispositive issue arising in relation to the decision under review (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2006) 228 CLR 152).
8. The matter is now before me. The applicant appeared before the Tribunal on 30 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Ms [A]. The applicant was represented in relation to the review by his registered migration agent.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
10. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

11. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
 - owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
12. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
13. In accordance with Ministerial Direction No.84, made under s.499 of the Act, the Tribunal is required to take account of PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.
14. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa of the same class as that applied for by the applicant. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse or de facto partner of the family head (r.1.12(2)(a)).
15. Spouse has the meaning given in s.5F of the Act:
 - (1) For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.
 - (2) For the purposes of subsection (1), persons are in a married relationship if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.

16. Section 91WB prevents the Minister from granting a protection visa to an applicant on the basis of the family unit criteria in ss.36(2)(b) or (c) if the applicant applies for the visa after their family member has already been granted a protection visa.
17. The issue in this case is whether the applicant has a well-founded fear of persecution on return to Pakistan for a Convention reason, whether there is a real risk he will suffer significant harm if returned from Australia to Pakistan, or whether he is a member of the same family unit as Ms [A]. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Identity and nationality

18. To the Department the applicant provided a copy of his Pakistan Passport. To the Tribunal he provided his Pakistan birth certificate and Australian driver's licence. On the basis of the identity documents before me and with no concerns raised about his identity, I find that the applicant is who he claims to be and is a national of Pakistan, which is also his receiving country.

Credibility

19. In assessing the applicant's credibility, the Tribunal notes that the mere fact that a person claims fear of persecution for a particular reason does not establish the genuineness of the asserted fear, that the fear is "well-founded" or that it is for the reason claimed. A fear of persecution is not "well-founded" if it is merely assumed or if it is mere speculation. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for her or him. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169 70.)
20. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.
21. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547).

Certificate

22. On the Department file there is a certificate pursuant to s.438(1). The previous Tribunal dealt with this matter and discussed it with the applicant. I have considered the certificate and decided it is valid. However, the gist of the material covered, so far as that is relevant to the review, has been put to the applicant.

Claims

23. The applicant and Ms [A] were married for the first time [in] May 2007. The applicant verbally divorced Ms [A] in August 2016 and was granted a divorce by the Federal Court of Australia [in] October 2017.
24. The applicant was charged with serious domestic violence offences committed against Ms [A]. He was convicted of the contravention of family violence orders, although the more serious charges were withdrawn. He completed a men's behaviour change program.
25. The applicant claims that the marriage with Ms [A] was against his father's wishes and his father wanted the marriage to end. His father came to Australia in 2011. Ms [A] called the police [in] July 2011 and accused the applicant's father of assaulting her.
26. The applicant's father returned to Pakistan in October 2011 and called a *Jirga* (a tribal meeting) at which he accused Ms [A] of disrespecting him and also (falsely) of being unfaithful to the applicant. The Jirga declared the applicant to be *karo* (black male) and Ms [A] to be *kari* (black female). (The terms for those who should be honour killed).
27. The applicant says that because Ms [A] has not gone back to Pakistan, he will be killed in her stead in an honour killing.
28. He also feared harm because he married a non-Muslim Australian woman without his father's permission.
29. Prior to the hearing, the applicant's representative provided statements from the applicant and from Ms [A], as well as emails to establish the visits made by Ms [A] to the applicant when he was in detention. In a further email, the representative provided:
- Notice of Intended Marriage from the Board of Imams [Australian State], for Ms [A] and the applicant to be re-married [in] June 2019;
 - Joint bank account statement, to show financial inter-dependence and genuine continuing relationship;
 - Statutory Declaration by Ms [A] dated 27 Nov 2018, in support of [Mr A's] application for Bridging [Visa];
 - Carer certificate, to prove the applicant took his child for medical attention when required;
 - Parenting plan signed [in] Feb 2018, to prove both the applicant and Ms [A] worked together in their children's best interest; and
 - a folder with articles on male honour killings in Pakistan
 - DFAT country report on Pakistan (see para 3.203)

30. At the hearing the applicant reiterated his claims that if he were to return to Pakistan he would be killed by his father and other members of the Jirga because he had been declared karo and because they could not get their hands on Ms [A], they would harm him instead to restore the family honour. He said his father had never liked Ms [A] and was determined to harm her and was very keen to harm him because he had reconciled with Ms [A]. He said the difficulty stemmed from the fact that Ms [A]'s family were poor. He said since their (initial) marriage, his father had punished him morally and mentally and financially.
31. He explained his version of the incident where the police had been called due to allegations that his father had been harming Ms [A]. He said that nothing had happened to his father and then in October his father went back to Pakistan and called the Jirga. He said that after this his father kept pressuring him to divorce Ms [A] so that they could harm her, but he stood firm and did not do that until they all applied for protection in 2013. He said that despite all the pressure from home he and Ms [A] were happy but then because of all the stress they got separated which was stressful for both of them. After they separated he met his former partner, [Ms B], and he was living with her and it was a difficult time for him and Ms [A] and the kids. He said that he and [Ms B] were together for 10 months; they were engaged in December 2016 and in February 2017 got married. He said that the news he had married a Christian woman, and lived with her prior to that was greeted with outrage in his community in Pakistan and was an additional reason his father would harm him.
32. He said that [in] March 2017 he was incarcerated, which led to the breakdown of his and [Ms B]'s marriage. He was reluctant to state what he was charged with but eventually said it had been for breach of an IVO taken out against him to protect Ms [A]. He further stated that there were other charges including [charge 1] and [charge 2] which were dropped. He said that the fact the charges were put against him by Ms [A] also increased the threat to her if she had to go back to Pakistan.
33. He said after the charges were dropped he was detained. He applied for a parenting plan to contact his children and from there he and Ms [A] formalised their parenting plan and since then they had started to talk to each other, and things started to get better between them. They applied successfully to have the IVO amended so that he could see the kids every week, and Ms [A] would bring the children to see him in detention.
34. In December 2018 he was granted a bridging visa and released from the detention centre, which was a relief for him, the kids and Ms [A]. After he was released he started to look after the kids and Ms [A], and since he had been released, their relationship had resumed and they had decided to get re-married again. He said that they had attempted to have a third child but Ms [A] had had a miscarriage. His evidence was that they had reconciled and resumed their relationship and were to be (re-)married.
35. I confirmed with the applicant that his claim was that his father had opposed his (first) marriage to Ms [A]. He said his father had only given his grudging consent to the marriage. I asked would the marriage not have gone ahead if his father had not given his consent and the applicant conceded this was the case but that his father had thought they were not staying in Pakistan. He said his father had allowed the marriage but it had been difficult for his father to bear. I noted that the decision record indicated that his father had provided a financial support letter for Ms [A] and their son to join the applicant in Australia. The applicant conceded this was the case but said his father never used to talk to the applicant and he didn't know why his father had done this. I noted that this action did not appear to me to indicate his father was unhappy with the relationship at that time. He said after the marriage his wife had gone to stay with his family and had experienced violence in that time.
36. I noted to the applicant that his claims seemed to have changed over time, with him claiming that Ms [A] had been declared kari by the Jirga, to claiming that he had been declared karo

and her kari by the Jirga. He responded that when the Jirga decided their verdict, they decided to kill Ms [A], and they did declare him a black man as well, but as she was the one who brought shame and was the main one, they decided to say this in their claims, and now they would kill him in place of Ms [A]. I asked why he had not mentioned that he had also been declared karo in any of his statements or evidence prior to the second tribunal hearing. He said he could not remember and reiterated that in the original decision he was declared karo. He said even though in their statements they said Ms [A] had been declared kari, the person associated is also considered karo. I noted that the difference in the claims over time might lead me to think that the Jirga judgement did not relate to him or did not happen at all. He said that there were no recordings and the Jirga happened in private so nobody had access to that. He said his father had been upset and offended that Ms [A] had called the police.

37. I noted that if this had been the case it seemed odd that his father had remained in Australia for some months after the police were called, and I may think that his father had not been so upset and offended that he would call a Jirga on the applicant. The applicant responded that his father had stayed as they could not do anything to him and as soon as he returned he went and called a Jirga.
38. I noted that I would have regard to his brothers' evidence but that I had concerns with this evidence and may rely on the information put to him under s.424AA that the inconsistencies in their claims may lead me to find their evidence was fabricated and place no weight on their corroborative evidence. He responded that his brothers had given a statement, they were not part of the Jirga and only heard news of the Jirga, and based on that they had given their statement in 2013 but as the applicant had said, along with kari, the karo also has to be punished. So in 2016 when the situation changed, when he got married to a Christian, that news got flashed back home and there were different reasons.
39. I noted to the applicant that I may have doubts that he would be harmed for reasons of living with a woman from a Christian background or marrying her if I disbelieved the Jirga occurred or that it mentioned him, it might lead me to doubt he would be targeted for these reasons. The applicant said that any kind of western values, marrying someone out of the religion, is an act of adultery in Islam.
40. I discussed with the applicant country information that as a person who had departed Pakistan legally, if he was returned on his passport or a temporary travel document, he would only be detained briefly by the authorities on arrival to ascertain his identity. He stated that as soon as he arrived his father would arrange to have him killed.
41. I also referred to country information that Pakistanis, particularly in urban centres such as his home city of Hyderabad, did not discriminate against those who had adopted Western ways or lived in the West. He responded that the country was based on Islamic values, the whole of Pakistan is not Westernised, still in the current situation women have been killed in the name of honour, and it is the custom of Pakistani local tribals to exercise those heinous customs. I referred to the DFAT report which indicated that 'DFAT assesses that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because of having lived in a western country.'¹
42. I also put to the applicant information from the DFAT report on honour killings, which I noted was consistent with the documents and information he had provided:

Women and girls in Pakistan are subject to rights based violations such as, but not limited to, gender based violence including (so called) honour killings and acid attacks, cruel, inhumane and degrading treatment by traditional justice systems called

¹ DFAT Country Information Report Pakistan, 20 February 2019, 5.45.

Jirgas (see Cruel, Inhuman or Degrading Treatment or Punishment , early and forced marriage (see Children and Hindus), kidnapping and bonded labour. Although the Sindh High Court declared *Jirgas* illegal in 2004, confirmed by the Supreme Court in 2005, they continue to operate. *Jirga* verdicts can include honour killings, mutilation, and *badal-e-sulah*, where girls and young women are given away to settle blood feuds or land disputes among men. Family members carry out honour killings against relatives perceived to have brought dishonour on the family by refusing an arranged marriage, forming a romantic attachment not approved by the family or, in the case of girls, for dress or behaviour deemed insufficiently modest. While young men can be targets of honour killing, most victims are female. HRCP reported in 2017 that local authorities cooperate in enforcing *Jirga* verdicts, and that many heads or members of *Jirgas* are elected members of local government, provincial assemblies or federal parliament.²

43. I noted that I may take the view from this information and the materials he had provided that men were largely only targeted where part of a couple, not where the man only was returning such as in his case. He responded that all of these reports said that where the *Jirga* members cannot get their hands on the main victim, they kill the *karo* to restore honour of the family members, they kill whoever they get their hands on.
44. The applicant did not advance any further reasons or basis on which he would be harmed on return to Pakistan.

Consideration

45. As discussed with the applicant at hearing, there were significant inconsistencies in the evidence he provided about his claim to fear harm as the victim of an honour killing.
46. He claimed his father had opposed his marriage to Ms [A], and had then punished the applicant by cutting of financial support, but was unable to explain why, if this was the case, his father had given his consent to their wedding and provided a financial support letter in favour of Ms [A]. His explanation at the hearing before me and at the previous hearing was that he did not know what had made his father do this. I do not accept this explanation. The spouse application for Ms [A] would have required the active participation of the applicant as the sponsor. I do not accept that his father would have, spontaneously, provided a letter to support his daughter-in-law without the active participation in that decision of the applicant. I consider that the provision of the letter by the applicant's father indicates that the father was supportive of the marriage at that time.
47. The applicant claimed that his father arrived uninvited and unannounced to stay with the applicant and Ms [A]. He claimed that his father had a disagreement with Ms [A], which led to her having to call the police. He claimed that he supported Ms [A] in this dispute. But this is not supported by the evidence. His father remained in Australia for some months after this incident. And in his statements he said that he had told the police he had not seen what happened as he had been sleeping, and later said that he was torn and frightened of what would happen if he had supported Ms [A]. I therefore do not accept that the applicant supported Ms [A] during or after the police incident, nor that his father was angry with the applicant because of this incident. The difficulty is that this is claimed to have been the impetus for the applicant to be declared *karo*. My findings above therefore raise further doubts that the applicant was declared *karo*.
48. The most significant difficulty though is that the applicant only claimed to have been declared *karo* at a late stage of this process. In his statements of 28 February 2013, 2 August 2013, of 2 December 2014, an undated statement sent after the first tribunal hearing, and the statement of 7 April 2015, the applicant spoke exclusively of the risk of harm due to Ms [A]

² DFAT Country Information Report Pakistan, 20 February 2019, 3.203.

having been declared kari, that his father had pressured him to divorce Ms [A], and in these statements, and at the interview with the delegate and the first Tribunal hearing, despite being given opportunity, he did not claim that he had been declared karo by the Jirga and was at risk of harm for this reason. It was only before the second tribunal that he belatedly claimed that he had also been declared karo by the 2011 Jirga, despite having had every opportunity to make this claim earlier in the process.

49. At the second tribunal hearing these concerns were put to the applicant and he responded that the father had wanted him to divorce and send the former spouse back to Pakistan but because of the divorce they cannot get their hands on her and so they would kill him instead; and the father did not like that he stayed in Australia and had a daughter and did not send his wife back; and they kill the black woman but often the black man as well.
50. At the hearing before me I also put these concerns to him. He responded that they were both condemned by the Jirga but because Ms [A] was the main one they put her down, and he said that they would kill him if he returned because they would not be able to get their hands on Ms [A]. He also said that there were different reasons, because he had married a Christian woman and lived with her before marriage.
51. I do not accept these explanations. I find that his evidence has changed materially over time; I find that the statements prior to the second tribunal stated only that Ms [A] had been declared kari in the 2011 Jirga. I find that despite being given a great many opportunities, the applicant did not make a claim that he was also declared karo at this 2011 Jirga. I find therefore that they were not both condemned at the 2011 Jirga. I find that his evidence to the second tribunal, and to me, was that he was declared karo at the 2011 Jirga. I find this to be inconsistent with his earlier claims. I find that his other explanations do not address the concern raised, which is with what I have identified as his inconsistent claims about being declared karo in 2011. I do not accept that the fact he divorced Ms [A], that he claims they would therefore take revenge on him as they could not get their hands on her, that his father did not like he stayed in Australia, nor that he married a Christian woman and lived with her before marriage explain in any way his inconstant claim to have been declared karo in the 2011 Jirga.
52. Lastly, I have had regard to the evidence given by the applicant's brothers at the previous Tribunal hearing that the applicant was declared karo at the 2011 jirga, but I have also had regard to the information put to the applicant pursuant to s.424AA by the second tribunal that this information was inconsistent with their earlier statements that only Ms [A] was condemned by the jirga. I find that the brothers' evidence has also been inconsistent over time, as with the applicant's. I have had regard to the applicant's explanation at the hearing before me for why this was but I do not accept these explanations. I find that the applicant's brothers' evidence that he was declared karo by the 2011 Jirga to be manufactured and untrue, and I give their evidence no weight.
53. I did not find the applicant to be a reliable witness when giving his evidence about the claimed Jirga and his designation as a black man. There were serious difficulties with his claims which he was unable to adequately explain, as above. This leads me to disbelieve key aspects of his testimony about these things, and further to find him not credible when advancing his claims to fear harm in Pakistan for reasons connected to these aspects of his testimony.
54. I do not accept, on the basis of the reasoning above, that the applicant was declared karo by a Jirga in 2011 or at any other time. I find that the applicant manufactured this claim at the second tribunal in order to strengthen his claims for protection. I find that this reflects adversely on the credibility for his claims for protection.

55. The applicant advanced further claims why his father and family would now wish to harm him, including that he intended (and now has) re-married Ms [A], that he had married a Christian woman and lived with her prior to that marriage, and that any kind of western values, marrying someone out of the religion, is an act of adultery in Islam. I do not accept these claims for a number of reasons. On the reasoning above, the inconsistencies in his evidence identified, and my concerns with his willingness to manufacture a claim, I do not accept that the applicant's father is so angry with the applicant that he wishes to harm the applicant. In making this finding I have had regard to the fact that the applicant's father remained in the applicant's house for some months after the police incident. I have found above that the applicant has not been credible in his claims that he was targeted for the Jirga. I have found that the applicant has been willing to fabricate claims in this process, and I consider that it is very likely that he is doing so in making these further claims. I do not accept that there is a real chance or a real risk that the applicant's father will harm the applicant for any of these further claimed reasons.
56. I do not accept that the applicant's father, rest of the family, members of the Jirga or the community has become so angry at him for reasons of the applicant's marriage to Ms [A], his divorce of her, his having stayed in Australia, his living with and then marrying a Christian woman, his re-marriage of Ms [A] or any other reason, that they would harm the applicant.

Will the applicant be persecuted for a Convention reason if he is returned to Pakistan?

57. I accept that the applicant is a Pakistani national from Hyderabad. I accept that he has lived in Australia for many years and would return as someone who has lived in a Western country and adopted some Western values. I accept that he would return as a failed asylum seeker.
58. I do not accept that he has been declared karo by a Jirga in 2011 or at any other time. I do not accept that the applicant's father, rest of the family, members of the Jirga or the community has become so angry at him for reasons of the applicant's marriage to Ms [A], his divorce of her, his having stayed in Australia, his living with and then marrying a Christian woman, his re-marriage of Ms [A] or any other reason that they would harm the applicant.
59. I have had regard to country information about the situation for returnees from the West and failed asylum seekers. The country information is clear that many many Pakistanis leave Pakistan for extended periods and live in the West, including Australia, and then return with no harm to them for this reason. Pakistan is a diverse country and in urban areas, I find on the country information, there is greater acceptance of Western behaviour, dress and mores.
60. I find that if the applicant returns to Hyderabad, he will be able to seek employment and housing, with his family there if he wishes.
61. I find that he will not suffer harm from his father, rest of the family, members of the Jirga or the community. He will not suffer harm from any of these people or groups because he was not declared karo in 2011 or at any other time. He will not suffer harm from any of these people or groups because I do not accept that his father or any of these other people or groups are angry at him for the reasons he has claimed or any other reasons.
62. I find that he will not suffer harm as a returnee from the West, a failed asylum seeker, or for any other reason.
63. I find that there is no real chance that the applicant will suffer serious harm amounting to persecution for reasons of his being declared karo by a Jirga in 2011, his having married and lived with a Christian woman, his re-marriage of Ms [A], his having contravened Islamic mores, his residing in the West, his returning from the West, his being a failed asylum seeker

or for any other reason by his father, rest of the family, members of the Jirga or the community, the authorities or anyone else on his return to Pakistan now or in the reasonably foreseeable future.

Are there substantial grounds for believing that there is a real risk the applicant will suffer significant harm if he is removed from Australia to Pakistan?

64. I have considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Pakistan, there is a real risk that he will suffer significant harm. For the reasons set out above, I have not accepted that there is a real chance that his father, rest of the family, members of the Jirga or the community, the authorities or anyone else would harm him for any reason if he returned to Pakistan, now or in the reasonably foreseeable future. In *MIAC v SZQRB*, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'.³ It follows that I do not accept that there is a real risk the applicant will suffer significant harm from his father, rest of the family, members of the Jirga or the community, the authorities or anyone else for any reason as a necessary and foreseeable consequence of the applicant being removed from Australia to Pakistan. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa).

Member of the family unit

65. The applicant, as above, gave evidence that he is now in a genuine and continuing relationship with Ms [A].
66. I had considerable doubts about whether he was being truthful. The applicant has committed offences against Ms [A] and whilst it is true that the most serious of those were withdrawn, there has been violence in the relationship.
67. What has caused me to accept, reluctantly, that the applicant is in a genuine and continuing relationship with Ms [A] is the evidence of his recent behaviour, and the testimony of Ms [A].
68. I found Ms [A], unlike the applicant, to be a wholly compelling and truthful witness. She has been a victim of the applicant in the past, but I also believe that Ms [A] is a highly capable and intelligent person able to make informed choices. She believes, and has had it evidenced to her satisfaction, that the applicant's behaviour has changed since their acrimonious separation and divorce.
69. She explained that when he had applied in 2018 for a parenting plan to see the children, she hoped that something had changed. She said that with the parenting plan she had agreed to allow the children to speak to him on the phone, but she did not speak to him very much. When he was moved to a detention centre in [City 1], she started bringing the kids to see him and they started talking to each other again. She said that the children would constantly ask when papa was coming home. Eventually he was released from detention and they went to pick him up. She forgave him and they tried to move on. She said that he moved into a separate place but then eventually he moved back in with the family in April.
70. She said that he had taken over a lot of the child care because she had been working. She explained that she was very busy in 2018, she had been working [a number of] jobs and was also awarded a community service award for her voluntary [service]. In order to work and do this voluntary work as well, he started looking after the kids all weekend. She said that she had recently got a job in [named] department and needed his help to manage work and the

³*MIAC v SZQRB* [2013] FCAFC 33 (Lander, Besanko, Gordon, Flick and Jagot JJ, 20 March 2013) per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

kids. He had shown himself to be reliable and to allow her to work and do her voluntary work by caring for the kids.

71. She said that when they decided to move in together again everything went really well and he had been working and helping out financially and had been taking care of the kids and of her as she had some health problems. She said that she had seen real change in him, before he had not been observant and now he was observant. She said that now if one of the Children was sick, she was able to call him and he would leave his work and look after the child because her work was not as flexible.
72. I asked if she had any concerns that if there were problems in their relationship or their lives that he would be violent again. She said she did not think this would happen because he had been made aware that the consequences of this would be severe. She said that she could give an assurance that he would not talk to her like he did before – his whole attitude and behaviour had changed for the better, now he has a family and kids and he is very happy with the kids.
73. She said that they planned to be re-married in June. She said that they had tried for another child but she had had a miscarriage.
74. The applicant spoke again in support of the evidence Ms [A] had given. He said that he had undertaken a behaviour management course whilst in prison, he had learnt to manage his emotions, he thought about why he had been incarcerated and about his own behaviour and reflected on them.
75. I explained clearly to the applicant, and separately to Ms [A], that if I concluded he was a member of Ms [A]'s family, and that was the sole basis on which he held a visa, if he committed any further violence against her and they separated, he would no longer be a member of her family unit and the visa would be liable to cancellation. They both indicated that they understood.
76. After the hearing a certificate of marriage was provided which indicates that the applicant and Ms [A] were married [in] June 2019.
77. I have carefully considered the information before me. As above, I found Ms [A] to be a highly credible witness. I do trust her ability to carefully consider whether the applicant has changed, and draw some comfort from this. I give great weight to her evidence that she and the applicant are in a genuine and continuing relationship. I give some weight to the behaviour of the applicant since his detention, including him seeking a parenting plan, attending behaviour management classes, and his behaviour in caring for the children since his release. These indicate to me a change in his behaviour and attitude towards Ms [A] and the children which, it is hoped, is durable. I have concerns that if there are difficulties, the applicant may revert to violence, but I trust that the changes are durable and that at the last, the possibility of having his visa cancelled will dissuade him from any violence.
78. The legislative scheme allows those who are members of the family unit of a person recognised for protection to also be granted visas. Whilst I have great concerns with the credibility of the applicant in relation to his own claims, for the reasons above I am satisfied that he is a member of Ms [A]'s family unit. I find he is her spouse because he is in a married relationship with her, being married to her under a valid marriage as established by the marriage certificate at Tf.215 [in] June 2019. I have accepted the evidence of Ms [A] and his behaviour since his release that they have a mutual commitment to a shared life as a married couple to the exclusion of all others, and that the relationship is genuine and continuing. I note the evidence here of the marriage certificate and financial information, and the evidence of Ms [A]. I note that because this is not an application for a partner visa, the

requirements in r.1.15A are not required to be met, but that it appears to me that I have evidence of most of the aspects of the relationship including the financial aspects, nature of the household and the nature of their commitment to each other. I note also the evidence of Ms [A] and the documents which demonstrate they live together. The applicant therefore satisfies s.5F in relation to Ms [A]. As such, he is her spouse and meets the definition of a member of her family unit.

79. Department records indicate that Ms [A] holds a protection visa granted in March 2018 on the basis of her satisfying s.36(2)(a). She holds a visa of the same class as that applied for by the applicant. As such, the applicant, as a member of her family unit, satisfies s.36(2)(b). The applicant has applied for a protection visa and is a member of the same family unit as a person who has been granted a protection visa, and he is therefore captured by subsection 91WB(1). However, he applied for the protection visa prior to Ms [A] being granted the protection visa and he is therefore not precluded from the grant of the visa by s.91WB.
80. This decision may appear perverse – the applicant was part (although not all) of the basis on which Ms [A] and the children were granted protection. In this case, time has led to reconciliation between the applicant and Ms [A]. It appears, and I hope is the case, that this outcome will allow for the best situation for Ms [A] and the children.

Conclusions

81. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
82. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
83. For the reasons given above, the Tribunal is satisfied that the applicant is a member of the same family unit as a non-citizen who the Minister is satisfied Australia has protection obligations because the person is a refugee, and who holds a protection visa of the same class as that applied for by the applicant. The applicant therefore satisfies s.36(2)(b).

DECISION

84. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies subparagraph 36(2)(b) of the Migration Act.

Sean Baker
Member